

STATE OF MICHIGAN
COURT OF APPEALS

RONALD D. HEES, KATHLEEN A. HEES, and
THOMAS LIEBOLD,

UNPUBLISHED
March 12, 1999

Plaintiffs-Appellees,

and

JAMES F. PAGELS and DONALD L. NORDEEN,

Intervening Plaintiffs-Appellees,

v

No. 197921
Otsego Circuit Court
LC No. 93-005492 NZ

MICHAYWE LIMITED PARTNERSHIP, TB
LAND HOLDING COMPANY, and WILLIAM
BOWMAN,

Defendants-Appellants.

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order denying their motion for reconsideration of the trial court's refusal to set aside a "default judgment."¹ Pursuant to this Court's order clarifying the scope of this appeal, we also consider plaintiffs' argument on the timeliness of this appeal.² We affirm the trial court's order refusing to set aside the "default judgment".

We first address plaintiffs' argument that this Court lacks jurisdiction because the application for leave to appeal was untimely. As a threshold matter, we hold that plaintiffs have established no jurisdictional impediment to our review because the time limits in MCR 7.205 are not jurisdictional. *Cipri v Bellingham Frozen Foods, Inc.*, 213 Mich App 32, 39-40; 539 NW2d 526 (1995). Although this Court may nevertheless refuse to grant leave to appeal on the basis of a party's failure to file an application for leave to appeal within the appropriate time limit, *Cipri, supra* at 40, here we decline to dismiss for two reasons.

First, defendants' application for leave to appeal was timely submitted under MCR 7.205(A), within twenty-one days of the order denying defendants' motion for reconsideration. The applicable entry date of the order for purposes of determining whether the application was timely filed under MCR 7.205(A) is September 3, 1996, because "entry" is defined in MCR 7.202(3), as "the placing of the order, judgment, or other document into the file and records of a lower court or the Court of Appeals by the clerk." See *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 359 n 1; 575 NW2d 290 (1998).

Second, assuming for purposes of plaintiffs' argument that defendants' arguments on appeal target the default order filed on September 11, 1995, the twelve-month time limit in MCR 7.205(F)(3) for "orders or judgments on the merits" does not render the appeal untimely. We must construe this court rule to secure "just, speedy, and economical" determinations, MCR 1.105, and in light of the purpose and object to be accomplished. *St George Greek Orthodox Church v Laupmanis Associates, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994). The court rule should also be construed in accordance with the ordinary and approved usage of language. *Id.* at 282.

In this regard, we note that a default does not actually determine the merits of a cause of action. However, a "judgment is considered to be a determination on the merits, and thereby triggers the doctrine of res judicata upon relitigation, even if the action was resolved by . . . default judgment." *Detroit v Nortown Theatre, Inc.*, 116 Mich App 386, 392; 323 NW2d 411 (1982). If the instant case had proceeded to a default judgment and defendants moved to set aside that judgment, then an appeal of right could have been filed from the order denying that motion, limited to issues arising out of the denial of the motion. *General Electric Credit Corp v Northcoast Marine, Inc.*, 402 Mich 297; 262 NW2d 660 (1978). If the case had proceeded to a default judgment and defendants filed an appeal from that default judgment, there would also have been an appeal of right because all "rights and liabilities" would have been disposed of. See MCR 7.202(8). However, the appeal would not have been limited because a party who has claimed an appeal from a final order is free to raise any issue on appeal, including issues related to other orders in the case. *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990). In either case, a late appeal would have been governed by MCR 7.205(F), because MCR 7.205(F)(1) establishes procedures for both untimely appeals by right and untimely applications for leave to appeal.

In the case at bar, the September 11, 1995 order was entered before the default judgment and, thus, falls within the ambit of an order that would be reviewable after the filing of an appeal by right from a final default judgment. Although MCR 7.205(F)(3) does not specify that it applies only to final orders or final judgments, we conclude that the twelve-month limit does not apply to a situation, as in this case, where there is an interlocutory appeal and the order in question would still be appealable by right after entry of a final judgment. The September 11, 1995, order is not "the order or judgment on the merits" within the meaning of MCR 7.205(F)(3).

In sum, we conclude that the appeal was timely filed under MCR 7.205. Moreover, even if the appeal could be considered untimely, we would not refuse to consider defendants' arguments due to the interlocutory nature of this appeal and the nonjurisdictional nature of the time limits in MCR 7.205. This holding does not, however, end our inquiry as to whether the individual issues raised by defendants

were properly preserved below, see e.g., *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994), or have been properly presented for appellate review.

Although each of defendants' issues are within the scope of our order granting the application for leave to appeal, we hold that defendants' first two issues are not properly before us because defendants have not identified the particular judicial decision that they are challenging and have insufficiently briefed their claims. This Court need not consider an argument that fails to address the basis of a trial court's decision. *Joerger v Gordon Food, Inc.*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Further, "[i]t is not enough for an appellant in his brief to simply announce a position or assert an error and then leave it to this Court to discover and rationalize the basis of for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In passing, we reject defendants' claim that a discovery order was a prerequisite to sanctions. Although MCR 2.313(B)(2)(c) does not apply directly unless there is a violation of a discovery order, we find merit in plaintiffs' position that the trial court was empowered to order sanctions under MCR 2.302(E)(1)(c) and (2), without a court order, for failure to respond to new requests for supplementation of prior responses. *Traxler v Ford Motor Co.*, 227 Mich App 276; 576 NW2d 398 (1998). We also note that a trial court has inherent power, not vested by rule or statute, to sanction parties for misconduct. See generally *Brenner v Kolk*, 226 Mich App 149, 158; 573 NW2d 65 (1997); *Cummings v Wayne Co.*, 210 Mich App 249, 252; 533 NW2d 13 (1995). Hence, while we find no record evidence of a written order that can be construed as compelling discovery, the absence of such an order was not dispositive of the trial court's power to order a discovery sanction. Further, with regard to defendants' second issue, we note only that defendants have not established that MCR 2.313(A)(2) deprived plaintiffs of standing to seek a discovery sanction.

Next, with regard to defendants' last issue, it is apparent that defendants are challenging the reasons given by the trial court for choosing the sanction of default, which underlies the September 11, 1995 order. Our review of the September 11, 1995 order is appropriate because this Court reviews the propriety of a trial court's decision to grant a default sanction relative to discovery separately and independent of the procedures for setting aside a default under MCR 2.603(D). See e.g., *Traxler*, *supra* at 278-279. Although defendants' application for leave to appeal was actually taken from a subsequent order denying reconsideration of the trial court's failure to set aside the default, we deem any challenge to orders entered after September 11, 1995, to be abandoned because they are not addressed in defendants' argument. *Cf. People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979).

With respect to defendants' argument that the trial court failed to evaluate fully all available options on the record, we find no error warranting reversal. Defendants' dilatory tactics throughout this protracted litigation warranted the default sanction.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Hilda R. Gage

¹ Although the order from which the application for leave to appeal was taken used the phrase "default judgment," this phrase is technically inaccurate because the case had not yet proceeded to a determination of the equitable relief and damages sought by plaintiffs. A default settles the question of liability as to well-pleaded allegations. *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). Issues of damages or other relief remain unresolved until entry of judgment. *Perry v Perry*, 176 Mich App 762, 767; 440 NW2d 93 (1989). See also *Draggo v Draggo*, 223 Mich App 415, 427; 566 NW2d 642 (1997). Thus, for purposes of our review, we have treated the issues on appeal as pertaining to a default, rather than a default judgment.

² Although the plaintiffs and intervening plaintiffs filed a joint appellees brief, the issues on appeal only pertain to plaintiffs. Hence, for purposes of our review, we refer to the appellees solely as plaintiffs.